



Administrative Law Judge Coordinating Council

A Consortium of National Organizations Representing U. S. Administrative Law Judges

c/o Federal Bar Association Judiciary Division
2215 M Street, N.W.
Washington, DC 20037

April 11, 2006

Honorable Linda M. Springer
Director
Office of Personnel Management
1900 E Street, N.W.
Washington, D.C. 20415-8200

RE: March 3, 2006 Meeting

Dear Director Springer:

Thank you for meeting with the representatives of the Administrative Law Judge organizations on March 3, 2006. This letter responds to several matters raised at that meeting. The joint signatories to this letter represent virtually all the major professional organizations of Administrative Law Judges. All of us share the same goal of preserving the integrity of the Administrative Procedure Act and the administrative law judiciary.

At the March 3 meeting, you requested a summary of “surrogates” previously discussed with OPM officials as a potential avenue to provide relief for ALJ pay compression. The primary surrogate suggested is the Model Code of Judicial Conduct for Federal Administrative Law Judges. We previously provided a copy of the Code to OPM staff, and have included a copy herewith. It represents a straightforward template for ALJs to assure that their conduct and performance conforms to public and traditional expectations. The Code was endorsed in 1989 by what is now called the National Conference of the Administrative Law Judiciary of the Judicial Division of the American Bar Association (ABA) and enjoys the support of all ALJ organizations. We reiterate that a “pay for performance” regime is antithetical to the independence of the administrative law judiciary. However, the ALJ organizations have informally suggested that the Model Code be codified in law or regulation as a standard of satisfactory conduct and performance for ALJs. This would provide both the ALJs and OPM with specific rules by which ALJs must abide.

In addition to the Model Code for Judicial Conduct of Federal Administrative Law Judges, MSPB and OPM have recognized the applicability of the ABA’s Code of Judicial Conduct (1972) to federal administrative law judges. *See, e.g., In Re Chocallo*, 1 MSPBR 612 (1978) and the Administrative Law Judge OPM Program Handbook (May 1989), Ch. 13, F. Misconduct as Basis for Action, which notes that, “The code of Judicial Conduct, adopted by the House of Delegates of the American Bar Association (ABA) in 1972 and updated in 1984, although not *ipso facto* binding on Administrative Law Judges, has been cited by the former U. S. Civil Service Commission and the U.S. Merit Systems Protection Board as an appropriate guide in evaluating the type of conduct of an Administrative Law Judge in certain cases.

Moreover, some agencies have adopted certain provisions of the Code in their own regulations concerning conduct of Administrative Law Judges and/or other agencies.”

The closest recognized analogy to the role of an administrative law judge is other federal trial judges. Our job duties have been recognized by the Supreme Court as functionally equivalent to those performed by federal trial judges. *Federal Maritime Com’n v. South Carolina State Ports Authority*, 535 U.S. 743 (2002); *Butz v. Economou*, 438 U. S. 478 (1978); *see also*, *Rhode Island Dept. of Environmental Management v. United States*, 304 F.3d 31(1st Cir. 2002) (finding that Department of Labor administrative law judges are functionally equivalent to Federal District Judges).

Most of us hear cases where our own agencies are parties before us. We should not be subjected to evaluation by parties who appear before us, or by people who can be seen by the public to be influenced by agency management.

Nearly all ALJ decisions are subject to review by someone in the agency where they serve. All ALJs are subject to discipline by their agencies upon a finding of good cause by MSPB. Congress requires that the ALJs from some departments and agencies (for example, HUD and FERC) file annual reports concerning case processing times and dispositions. Additionally, some departments and agencies have adopted rules and practices to address complaints about the ALJs. *See* Procedures for Internal Handling of Complaints of Misconduct or Disability, 46 Fed. Reg. 28050 (1981), as amended, 48 Fed. Reg. 30843 (1983) and 52 Fed. Reg. 32973 (1987) ["Peer Review"]. Thus, there are already ample measures to assess the performance of ALJs; and there has not been any showing that performance evaluations are needed. Implementation of performance evaluations would be an administrative nightmare, costly in time, money and morale.

The matter of pay compression is critical to recruitment and retention of quality lawyers to serve as ALJs, and attract quality ALJs to serve as supervisory judges, such as chief judges. Already, the pay of AL-1, AL-2, and the majority of AL-3F judges is identical and at the total pay cap allowed by law (\$152,000). Some AL-3E judges are at the total pay cap with the remaining AL-3E judges close to the cap. These four categories encompass the vast majority of ALJs. Chief judges and supervisory judges earn nothing additional for their executive and managerial duties. The numbers of applicants for these critical positions have declined and numerous vacancies go unfilled, as judges see no incentive to take on the additional burdens and responsibilities of management. In this respect, it is essential that the compensation of the administrative law judiciary is competitive with the level of total compensation, including incentives, applicable to more than half of the General Schedule. Without reference to the incentive compensation that is being extended to the General Schedule, the starting pay for AL-3A judges is only \$93,500, far less than the pay of a GS-15 at Step 10 (\$118,987) and the minimum SES starting salary of \$109,808. In fact, a newly hired ALJ in Washington DC is paid \$112,213, less than an experienced GS-14 government lawyer at Step 8, earning \$112,734. The quality of ALJ applicants will certainly decline as the level of ALJ pay declines relative to competitive positions in the federal government. These are the traditional recruiting grounds for quality federal lawyers. Without some pay compression relief, ALJ pay will fall further behind.

This will negatively affect the quality of adjudication and the actual and perceived legitimacy of the administrative hearing process.

Another issue that was discussed was the need to establish a stronger working relationship with OPM. While OPM feels that its reorganization effectively serves the needs of ALJs, we respectfully suggest that communications could be improved to the benefit of ALJs and OPM. While you suggest that every stakeholder group wants its own office within OPM, we respectfully point out that Congress has not tasked OPM with the responsibility to manage any other program and protect any other class of employees the way it did with ALJs under the Administrative Procedure Act. If OPM is not willing to reestablish an Office of Administrative Law Judges to undertake those congressionally mandated responsibilities that it has abandoned in recent years, it should support the transfer of those responsibilities to an Administrative Law Judge Conference of the United States, as proposed by the ALJ community.¹ In the interim, we hope that you will identify the appropriate person or persons, with responsibility for the most pertinent and pressing issues, such as the finalization of the register and examination process, as well as the pay compression issue, which we addressed above. We need the names and telephone numbers of specific contacts because those of us who have attempted to contact the Acting General Counsel with ALJ issues have been shuffled from person to person without receiving any real assistance.

Thank you for the time you took to meet with us. We look forward to working with you and your agency to meet the challenges outlined at our meeting and in this letter. We would like to schedule another meeting with you in the very near future to discuss these issues.

Sincerely,

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¹ The establishment of an Administrative Law Judge Conference of the United States was proposed in H.R. 5177, introduced in the 106th Congress. The purpose of the proposed ALJCUS was to centralize administration, management, training and assignment of federal ALJs. The proposed law also would have codified the Model Code of Judicial Conduct for Federal Administrative Law Judges as the standard of conduct applicable to federal ALJs.